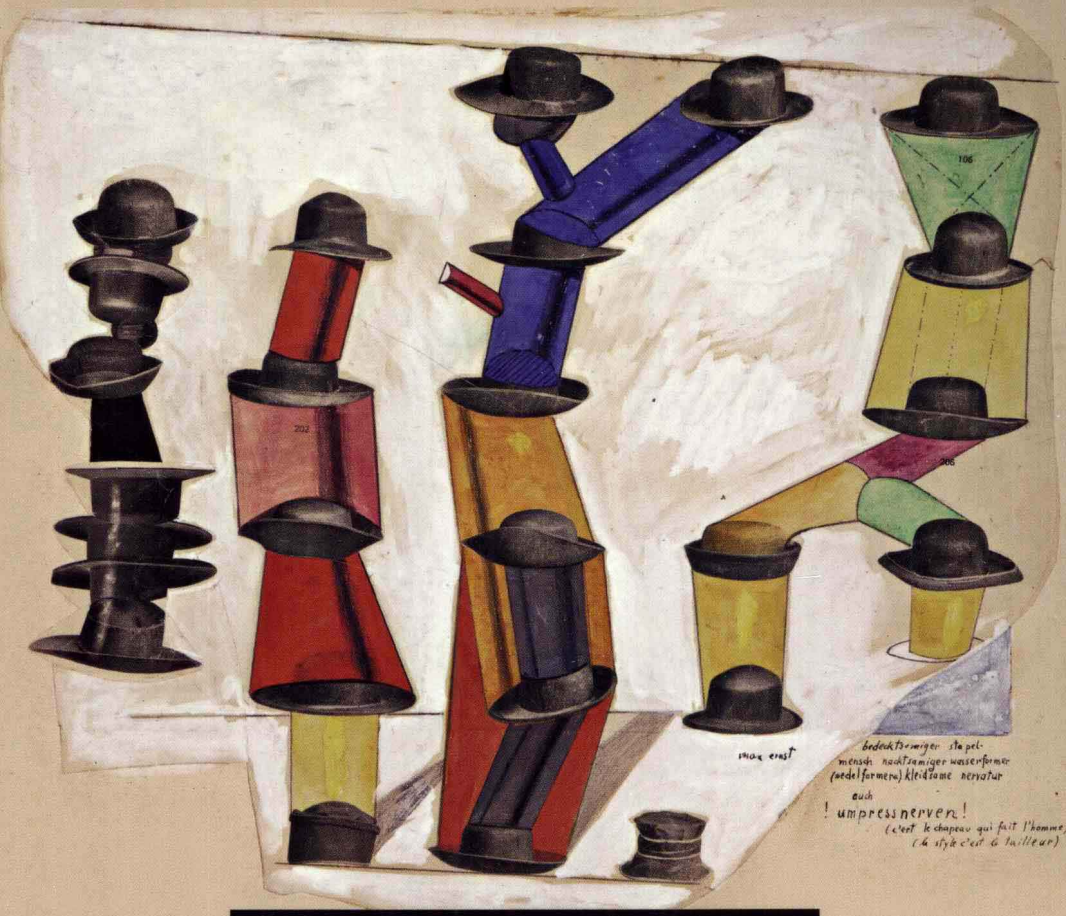

TRANSNATIONAL ADMINISTRATIVE RULE-MAKING

PERFORMANCE, LEGAL EFFECTS AND LEGITIMACY

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Contents

Introduction

Exploring Transnational Administrative Rule-Making

OLAF DILLING, MARTIN HERBERG, GERD WINTER

IN THE AGE of globalisation, many regulatory problems lie beyond the reach of the nation state. Therefore, solutions have to be found which extend beyond territorial borders. The appropriate forum for addressing these issues would be international law; but this requires formal consensus amongst states, which is difficult to obtain. A number of informal structures of pragmatic public governance have emerged as an alternative to formal law-making processes, which operate within the transnational space between national and international law. These structures display a great variety—ranging from loose transboundary networks that link national administrative agencies to transnational expert committees and networks involving administrative staff of international organisations. They work out their own agendas and problem-solving strategies, and to a certain extent emancipate themselves from their formal national or international parent institution. These network-like structures have become important building blocks of global governance, addressing today's regulatory issues in a more flexible way. At the same time, however, their informality raises crucial questions of legitimacy.

It is widely recognised that the emergence of such network-like mechanisms poses serious challenges for contemporary socio-legal research. This is evident with the vastly expanding literature on the subject.[1] The challenges arising in this new area can be structured as follows:

— Identifying the emerging phenomena of transnational administrative governance and framing them in proper terms.
— Studying cases empirically in order to understand their structures, procedures and performance, and developing typologies.

[1] A bibliography of Anglo-Saxon publications on global administrative law lists about 150 titles on the topic until 2006 (de Bellis 2006).

— Exploring relationships of formal national or international law to transnational soft law in order to understand how informal rules are made effective and thereby contribute to the exercise of power.
— Assessing the problem-solving capacity and procedural fairness of transnational arrangements to identify different ways of achieving legitimacy.

The present volume aims at contributing to all of these questions. Our overall message is that transnational administrative governance leads to a paradox: on the one hand, it performs well in many areas, providing solutions that are not achievable by state and international law; on the other, the very condition of its success, namely its informality, profoundly lacks legitimation in a strict sense. This notion of legitimation encompasses more than good output, and includes transparent and fair procedures. Alternative legitimation, which may supplement traditional formal international and national chains of legitimation, is one way of solving this paradox.

This book explores a broad range of legitimation mechanisms of different type and quality and shows that there can be a fit between certain forms of legitimation and specific governance constellations. For instance, the political character of many technical problems call for institutional arrangements which allow political judgments and expert opinions to be separated and assigned to different fora. Hereby it is avoided that technical and scientific issues are infiltrated by interests and power games. On the other hand, however, problems that require the settlement of fundamental conflicts of interests and cultural differences may best be handled, if the interests of all parties are effectively represented throughout the process.

To understand the different types of legitimation, it is necessary to explore the structures and the performance of the various transnational arrangements. Examples are taken from selected fields of transnational governance, such as technical standard setting, toxicology, chemicals management and regulation of food additives.

I. DEFINING THE OBJECT OF RESEARCH AND EXCAVATING A DISCRETE STRATA OF GLOBAL NORMS

A large number of definitions have been put forward to describe the phenomena under investigation. A widely used denominator is the term 'transnational'. A broad definition of the term takes credit from Philip Jessup, who defined transnational law as comprising 'all law which regulates actions or events that transcend national frontiers' (Jessup 1956). While this includes formal as well as informal law beyond the state, the informal nature of transnational law is better grasped by Robert Keohane and Joseph Nye who describe the emerging phenomena as 'contacts, coalitions, and interactions across state boundaries that are not controlled

by the central foreign policy organs of governments' (Keohane and Nye 1971: 331). It might be added that the difference between these two approaches also corresponds with two different meanings of the Latin prefix *trans*. Whereas the classical 'beyond, over' (as in 'transcendence') is used to denote any regime beyond the state, the medieval 'through' (as in 'transparency') characterises activities that pierce state sovereignty. The second use of the term has the advantage in shedding light on the ubiquity of transnational norms inside the domestic sphere, as well as the erosion of territorial confines. This has also been pointed out in several recent studies (Slaughter 2004; Cassese et al 2008; Kingsbury, Krisch, Stewart 2005), emphasising that the emergence of transnational phenomena blurs the boundaries between the internal affairs and foreign policy.

Nevertheless, transnational private governance may be distinguished from public governance in terms of the predominant actors who take part in the process. While private governance involves mainly business representatives, public governance is mainly carried out by public officials. Overlaps in these spheres lead to a hybrid private/public governance-constellation.

A common question is whether these emerging arrangements can adequately be understood as administrative. Once again, reflection on the Latin origin of terms is illuminating in this respect. *Administrare* can be derived from the Latin word *manus* (hand) (Weinhart 1821: 442), which refers to the practical 'hand-ling' of matters, as in *manum agere* (to act by hand) or management.[2] In modern political and legal discourse, the term has often been used to emphasise the difference between matters of (high) politics, on the one hand, and technical or pragmatic issues, on the other. Thus, 'transnational administration' points to more pragmatic problem-solving mechanisms at the global level. Other than the legal statutes and international treaties as made by political actors and heads of state, these administrative settings are mainly concerned with producing norms and standards of a more technical and issue-specific character.

Taking this into account, the *first goal of this volume* is to prove the heuristic value of the confined and thus discrete conception of transnational administrative governance.

II. VARIETIES OF TRANSNATIONAL ADMINISTRATIVE CONSTELLATIONS

Transnational administrative governance takes many forms. This calls for the development of an adequate typology. Most prominent is the threefold

[2] Some etymologists also derive *administrare* from *minor*, referring to the subordinate character of the executive branch (Skeat 2005).

categorisation of (1) transboundary networks of national agencies emerging more or less spontaneously outside the realm of international organisations, (2) networks of national agencies acting with the symbolic and secretarial assistance of international organisations, and (3) expert and administrative staff implementing the objectives of international organisations (Slaughter 2003; Slaughter 2004). In all of these constellations, network actors can acquire a large amount of discretion and considerable manoeuvring room by emancipating themselves from their parent institutions. In some ways, the typology might be extended to include a fourth category: (4) arrangements in which actors from civil society play a significant role and which often lead to a hybridisation of public and private governance.

However, this typology is still very rough, as it fails to capture the core characteristics and issues concerning transnational administrative arrangements. The literature on this topic is highly productive in terms of developing concepts and evaluations, but often the empirical basis is rather anecdotal (see however Leuze, Martens, and Rusconi 2007; Dingwerth 2007). Only the empirical reconstruction of selected cases can reveal the wide range of issues, organisational structures, procedures, and problem-solving capacity of transnational administrative structures.

Therefore, the *second aim of this volume* is to enrich the empirical knowledge in this area in order to gain an insight into the different types of legitimate governance. A number of case studies are presented in order to learn more about the governance arrangements under research:

— What problems are at stake: can the main regulatory issues be addressed on a scientific basis or do the latter require political negotiation and compromise?
— How are governance systems organised: are there loose networks or dense committee systems? Is there a division of labour or a mixing of functions?
— Who is involved: experts, administrative staff, business representatives, non-governmental organisations (NGOs)?
— What procedures are established: publication and comment, reason-giving, access to information?
— What kind of output is produced: is sufficient consideration given to relevant scientific expertise? Are conflicting interests balanced? Are the relevant problems solved? What level of care for legally protected goods can be achieved?

III. FROM SOFT LAW TO HARD LAW: THE MANIFOLD SOURCES OF PUBLIC AUTHORITY

Although it is often observed that transnational norms enter the internal sphere of states in various ways, this statement deserves a more

detailed analysis. Legal statutes may refer to transnational administrative standards in a number of different ways (for seminal examples see Tietje 2001 and Warning 2009). Such analysis can reveal how transnational law is made effective or even binding on administrative as well as private actors. Although from a more formalistic view, transnational actors are not authorised to make legally binding decisions, it is important to note that these rules and norms are still effective in practice. Likewise, the widespread belief is that transnational administrative bodies serve mainly an advisory function to the existing national institutions. In actual fact, however, the norms and rules created by these bodies are rarely critically assessed or revised at the national level. This situation calls for a fresh look on issues of public authority, power and domination (Bogdandy and Goldmann 2008 and Bogdandy, Dann, and Goldmann 2008). Often, the influence exerted by transnational administrative networks is based on additional informal or diffuse sources of authority. These differ significantly from the classical hierarchical model of modern statehood—a phenomenon which also calls for more detailed empirical inquiries.

It is important to note that transnational informal norms not only influence the internal formal law of states, but also the international formal law of state interactions. For instance, informal standards established by bureaucracies or expert networks operating under the umbrella of international organisations may change the agenda as officially defined by the Member States (see Lindenthal and Oeter, in chapters seven and eight respectively). Furthermore, informal standards can obtain a quasi-binding status in the framework of international treaties. The World Trade Organisation (WTO) Agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade are important examples of the latter. Such standards provide a basis for the justification of trade restrictions, and thus impact indirectly on the internal legal order of states (see Herwig, in chapter six).

Apart from developing a typology of governance arrangements, the *third goal of this volume* is to explore how state-based law—on the national and international level—refers to soft law and how transnational norms are thereby strengthened. These interrelations between state-based law and transnational norms take on a variety of forms, including:

— the blanket incorporation of transnational norms without detailed control;
— specific references to individual transnational norms by legal statutes;
— reference to transnational norms in general terms or as legal principles (such as best available techniques, good practice rules of business sectors, etc);
— clauses providing that formal decisions shall be based on (but are not determined by) transnational norms;

— the application of transnational norms as guidance for administrative discretion; and
— the direct application of transnational norms in the transactions of private actors.

While these are examples of a passive reception of transnational norms, national and international law can, as some of our cases show, also actively instigate or support the formation and performance of transnational arrangements.

IV. ELEMENTS AND ORIGINS OF LEGITIMATION

The considerable power-asymmetries implied in the creation and application of transnational norms calls for specific efforts of legitimation (Bogdandy and Goldmann 2008). Rather than postulating normative criteria of legitimation in a deductive way, the challenge is to pay due regard to the regulatory problems and institutional achievements of the transnational sphere.

Continental European authors, especially those from Germany, tend to borrow their criteria from constitutional law. According to this view, transnational administrative governance is only legitimate if it is authorised by the national legal system, and thus formally controlled by the democratic mechanisms of the nation state (see as a comprehensive study Dederer 2004). By contrast, Anglo-American scholars have proposed to apply principles of national administrative law to the transnational sphere. This has been discussed under the new approach of Global Administrative Law, which mainly focuses on rather general and procedural principles such as transparency, participation, impartiality, reason giving and court review (see Stewart 2005, with further references).

In addition to the normative approaches discussed so far, it should be emphasised that in some regards transnational arrangements are phenomena in their own right, and cannot be easily evaluated in terms of state-based concepts. In fact, given the wide range of issues, constellations of interests, organisational settings, working procedures and problem-solving capacities, transnational arrangements may produce their own specific brand of acceptability. Taken from this view, any assessment—although it may be informed by state-based concepts—should take this potential of self-legitimation into account.

State-centred conceptions of legitimacy are formalistic in nature, and thus lack the analytic and reformatory potential with regard to non-hierarchical coordination processes. In the emerging governance networks there are many different types of actors at different policy levels, which runs counter to the hierarchical control structures implied by

traditional conceptions of legitimacy (see Kingsbury, Krisch and Stewart 2005). Despite its problematic constitutional status, transnational rule-making is often regarded as inevitable. While transnational governance mechanisms suffer from a rather obvious democracy deficit, their ability to perform does often provide a high degree of output legitimation (as defined by Scharpf 2001: 13). In an age of globalisation and privatisation, states often seek to retain their influence by participating in transnational rule-making, rather than simply resigning to the obstacles of international diplomacy and treaty-making.[3]

Even though performance is an important aspect of legitimation, procedural legitimation is also required, both as a value in itself and as a precondition for broad acceptability in a pluralistic society. To achieve this, more specific criteria should be developed that take account of the diversity of transnational rule-making structures.

The detailed exploration of the norms and practices of transnational governance brings to light a number of characteristics, which can serve as supplementary or even alternative sources and elements of legitimation, as opposed to the classical delegation model of the constitutional state. For example, a deliberative mode of decision-making, as often observable in scientific discourse and expert communities, can considerably increase the quality as well as the acceptability of the results, in particular where this comes with specific duties of reason-giving within a climate of mutual critique (see Cohen and Sabel 2006 and Joerges 2009; see also Herberg in chapter three and Lange, in chapter two). Paradoxically, even a mode of 'muddling through' (Lindblom 1959) can help to tackle the existing regulatory problems, especially if this goes along with a mixture of deliberation, negotiation and experimentalism (see Winter in chapter four). Furthermore, different initiatives from civil society can amount to new forms of democratic governance and participation on the global level (Dingwerth 2009 and Steffek and Gomes-Pereira, in chapter 10). In the long run this may eventually lead to the development of proto-federal and proto-parliamentary representation even in the absence of a world government (see Nowrot, in chapter nine).

In practice, these different modes of legitimation often complement each other in complex arrangements. In the Codex Alimentarius Commission, for example, more technical aspects of risk assessment are often worked out in scientific expert committees and distinguished from value-laden aspects of risk management. These are dealt with in political commissions,

[3] Abram Chayes and Antonia Handler Chayes write that '(i)n today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.' (*cf* Chayes and Chayes 1995: 27).